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Issue Date: 30 November 2004

CASE NO.: 2004-LHC-922

OWCP NO.: 07-146036

IN THE MATTER OF:

KENNETH R. CRONIER,

Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.

Employer.

APPEARANCES:

TOMMY DULIN, ESQ.

For The Claimant

PAUL F. HOWELL, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for Section 22 modification under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the "Act"), brought by Kenneth R. Cronier ("Claimant") against Northrop Grumman Ship Systems, Inc. ("Employer").

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on August 13,

2004 in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 12 exhibits and Employer proffered 27 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Upon conclusion of the hearing, oral closing arguments were delivered by both parities. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. Claimant was injured on July 30, 1997.

2. Claimant's injury occurred during the course and scope of his employment with Employer.

3. There existed an employee-employer relationship at the time of the accident/injury.

4. Employer was notified of the accident/injury on September 26, 1997.

5. Employer/Carrier filed a Notice of Controversion on April 10, 2000.

6. An informal conference before the District Director was held on December 12, 2003.

7. Claimant received permanent partial disability benefits from April 15, 1998 and continuing at a compensation rate of $206.31.

8. Claimant's average weekly wage at the time of injury was $520.65.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

9. Medical benefits were paid pursuant to Section 7 of the Act.

10. Claimant reached maximum medical improvement on February 6, 1998.

11. The Second Injury Fund has been found applicable to the facts of this claim in the Administrative Law Judges' Decision and Order of October 12, 1999.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Claimant sustained a change of economic condition requiring modification under Section 22.

2. The nature and extent of Claimant's disability.

3. Attorney's fees.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant was born on May 18, 1955, and was 49 at the time of the formal hearing. Claimant has been married for 20 years and has a high school degree. He currently lives in Hurley, Mississippi. Claimant testified that since the July 28, 1999 hearing[2], he still has pain, specifically, numbness in his left shoulder and down into his left arm. He has had this pain since his first injury in 1992. For his pain, Claimant takes over-the-counter medications on a daily basis such as Tylenol or Ibuprofen. No medications are prescribed to Claimant. (Tr. 14-15, 32; EX-25, p. 3).

Claimant testified he first returned to work for his brother, in May 2000, for his brother at Cronier Plumbing. Claimant was a plumber's helper at Cronier Plumbing and his

[2] Judge James Kerr issued a Decision and Order in Claimant's case on October 12, 1999, in which he found Claimant permanently and partially disabled, and awarded § 8(f) Relief. The decision was affirmed on reconsideration and by the Benefits Review Board (BRB) on December 13, 2000. The Second injury fund assumed payments to Claimant on February 11, 2000. (EX-4; EX-5; EX-6; Tr. 7, 10).

duties consisted mainly of getting tools out of the van. His brother was aware Claimant had a prior cervical surgery and of Claimant's limitations upon hiring him. Claimant earned approximately $3,370.00 in the seven-month period working for Cronier Plumbing. (Tr. 7, 10, 16; EX-10, p. 1; EX-25, p. 5).

In June 2000, Claimant began working for Autry Greer & Sons ("Autry"), a store in Mobile Alabama. Claimant worked for them for two weeks, stocking counters. He did not inform Autry of his prior injuries or restrictions. Claimant earned $414.75 during the weeks he worked for Autry. He also did side work for Ms. Nancy Howell, where he earned $293.00 "bush hogging." In 2000, for a short period of time, Claimant drove a school bus for the Jackson School District. He also worked for Jackson School District in early 2001. (Tr. 17-19; EX-10, pp. 1-3, 8-9).

Claimant also testified about more recent employment, as a boilermaker with Fluor Daniels, which began in October 2001 and lasted three weeks. He further testified he was self-employed farming beef cattle. Claimant rented pasture, but does not anymore. When he rented the pasture, Claimant owned 12 to 15 cattle. (Tr. 18-19; EX-10, p. 3).

Claimant also worked for Job Crafters Incorporated at Benders Shipbuilding as a shipfitter for one week, earning $265.50. He was laid off from this job, which was only temporary. Claimant's next job was through MK Productions which lasted a day and one-half. (Tr. 19-20; EX-10, p. 3).

Claimant's next significant job was in 2002 with B. E. & K. Construction Company ("B. E. & K.") where he performed shutdown work. In 2002, Claimant also did shutdown work for Fluor Daniels and was self-employed farming beef cattle. Although in 2001, Claimant's net earnings from farming beef cattle totaled $4,562, he had no net earnings in 2002. In 2003, Claimant thereafter worked shutdown jobs for both Fluor Daniels and B. E. & K. (Tr. 20-21; EX-10, pp. 3-5; EX-25, p. 12).

In 2004, Claimant began working a temporary job with Signal. Claimant could not recall when this job would end, stating "[i]t could end as early as next week or could be another month or so." He described pain in his neck and numbness in his left arm as problems he experiences while performing his job duties at Signal. (Tr. 21- 22).

In order to perform his duties, as a rigger at Signal, Claimant must "hook the frame up to . . . different things, foundations . . . screwing and unscrewing the pin in shackle." Claimant testified he gets assistance with his tasks. He explained he has one guy who is a helper and just works with him, helping him lift things in order to stand something up, get "choker wrapped," "hook up shackles," etc. Claimant is able to take breaks and rest while working at Signal, he gets a break at 9 p.m. and a break at 11:30 p.m. Claimant testified he works the second shift at Signal, from 5:00 p.m. until 3:30 a.m. (Tr. 22-23).

Claimant learned of the job opening at Signal through his nephew who previously worked for Friede Goldman, the former owners of Signal. Claimant's nephew knew the rigging superintendent and asked him if he could use Claimant. Claimant completed an application for employment with Signal and answered "no" to all questions asking about work restrictions. (Tr. 24).

Claimant underwent a pre-employment physical for Signal with Dr. Cooper. During the pre-employment physical, Claimant's blood pressure was checked, he was asked to do motions, such as twisting and sitting, and the doctor checked Claimant's reflexes. Claimant testified the doctor did not examine his neck or check the rotation of his head. (Tr. 24-25).

Claimant described a typical shift at Signal and the hours he works actually performing rigging work. He explained he usually spends two hours rigging, but sometimes four to six hours, stating it all depended on whether it was "slack" or not. (Tr. 25).

Claimant remembered meeting with Mr. Tommy Sanders, a vocational expert, hired by Employer. Claimant testified "as far as [he] can remember" he answered all of Mr. Sander's questions honestly, but could not recall Mr. Sander's actual opinion regarding what type of work was suitable for Claimant. (Tr. 25-26).

Claimant recalled Dr. Danielson as the doctor who assigned his restrictions, stating he was restricted to lifting no more than "35 to 40 pounds." He did not remember any other restrictions placed on him by Dr. Danielson. No doctor has removed these restrictions. (Tr. 26-27, 29).

Claimant admitted he did not know if he was capable of returning to the type of work he was doing when injured at

Ingalls, stating "without sustaining the same type [of] employment that I'd had . . . for extended periods of time. I don't know if I'd be able to . . . do it or not." Claimant was a shipfitter while working for Ingalls. (Tr. 27-28, 56).

Claimant described work on shutdown jobs as being sporadic, lasting anywhere from two weeks to several months. He explained that he found these types of jobs from "hot sheets" or from word-of-mouth. Claimant does not usually have to lift more than 40 pounds as a rigger on shutdown jobs and when he does, he usually has a helper to assist him. As a shipfitter, however, Claimant did have to frequently lift more than 40 pounds. (Tr. 28-29; EX-25, p. 15).

On cross-examination, Claimant admitted he has not seen a doctor since Dr. Danielson assigned his work restrictions in July 1999. The only doctor he has seen since, Dr. Cooper, performed a pre-employment physical for him. Claimant also had a pre-employment physical at Fluor Daniels, but it was with a nurse, not a doctor. Claimant testified the pre-employment physicals were not thorough and consisted of 10 to 20 people standing around, being told to stand up, raise hands over head, hold arms straight out, twist side-to-side, and to do deep knee bends. Claimant passed all pre-employment physicals. He worked for B. E. & K. about nine times and each time he underwent a pre-employment physical with either a paramedic or nurse. (Tr. 30-32).

Claimant reviewed his employment history and earnings on cross-examination. While working for Cronier Plumbing, Claimant initially earned $6 per hour as an assistant plumber and later earned $15 per hour as a plumber. He could not recall how many hours a week he worked at Cronier Plumbing. (Tr. 32-33; EX-10, p. 5).

Claimant's next significant employment was shutdown work with Fluor Daniels. He described a shutdown as when "they go in and shut down a place and do repairs that need to be done," in factories, refineries, paper mills, and power plants. Claimant admitted that there are shutdown jobs available all over the country. He testified a person can buy "hot sheets," which list various shutdown jobs all over the country. Claimant did not know exactly where he could buy a "hot sheet," but had seen them while on various jobs. He acknowledged that other people use these "hot sheets" to obtain employment. (Tr. 33-35).

Claimant testified he knew some people who only work shutdowns, going from shutdown to shutdown. Claimant disclosed the availability of a lot of overtime and higher wages in shutdown work was due to the brief period of time in which the companies need the work performed. (Tr. 35-36).

Claimant acknowledged working for Fluor Daniels about six times beginning in October 2001. Claimant originally stated he did not disclose his previous workers' compensation injury on his work applications at Fluor Daniels or B. E. & K., however, when questioned further, he admitted he could not recall whether he had advised them of his neck injury or not. He did recall, however, advising Signal of his neck injury. He advised Signal of his actual neck surgery when he went in for the pre-employment drug screen with a nurse. Claimant advised the nurse that he had "a neck surgery . . . some discs fused at C5-6 and 6-7." (Tr. 36-37; EX-27, p. 22).

Claimant reiterated that he had not mentioned his injuries or restrictions to either Fluor Daniels or B. E. & K., nor did anyone at either company ask him whether he had any prior injuries. (Tr. 37-38).

Claimant admitted he did not have any trouble being hired at Signal even after he advised them about his neck injury and surgery. Although Claimant notified Signal of his prior injury and surgery, he denied having any restrictions. (Tr. 38).

When Claimant worked as a boilermaker his duties required grinding, hold watching, fire watching and rigging. While working for Fluor Daniels, Claimant worked in Arkansas, North Carolina and Pascagoula, Mississippi. His pay scale with Fluor Daniels was $17.50 - $19 per hour and he worked anywhere from 32 hours up to 80 hours per week, depending on the type of job. Claimant admitted, while working for B. E. & K. or Fluor Daniels, he was working an average of 12 hours a day for seven days a week and earning over $2,000 a week before taxes. (Tr. 39-40).

Although Claimant admitted he has not received any new injuries since working these shutdown jobs, he did not recall telling anyone that he wasn't having significant problems performing the work. Claimant did admit, despite these long 12 hour work days, that he has not seen a doctor since 1999. (Tr. 40-41).

Claimant was questioned about the length of these shutdown jobs and testified they lasted anywhere from two weeks to a couple of months. The longest shutdown job he worked was at a Pascaguola refinery, where he worked about five months, averaging between 40 to 60 hours per week. Typically, his shutdown work has been for two-week periods of 12-hour days, seven days a week, but he has also worked as little as one day. Claimant testified he has never worked more than 84 hours in one week. (Tr. 41, 43).

Claimant's work at both B. E. & K. and Fluor Daniels was very similar. He testified he was lucky and would get a lot of "hole watch and fire watch," but also had to do a bit of rigging and grinding. At B. E. & K., Claimant earned about $18-19 per hour. (Tr. 42).

Claimant testified he was never fired from either B. E. & K. or Fluor Daniels and had never received any type of warning slip for doing poor work. Claimant, in fact, had good attendance at these jobs. He felt like he gave them "a good day's work for a good day's pay." (Tr. 43-44).

Claimant did not know whether B. E. & K. continues to have shutdown work anywhere in the country. He testified that "[t]hey get slack during summer periods. Usually the division I worked in they do the shutdowns, it's basically during the cooler months." (Tr. 44).

Claimant also worked for a "little construction company" in Saraland, Alabama called Boiler Tek as a boilermaker, earning $16 per hour for about four or five days, 12 hours per day. (Tr. 44-45).

When Claimant worked for Job Crafters, as a shipfitter, he did not receive any warning slips for doing a bad job. Claimant testified the job was for only two days and then he was laid off. He was hired in one day and by the time he got to the job everyone was laid off. (Tr. 45).

Claimant admitted he primarily worked shutdown jobs, but did not go from shutdown to shutdown. He explained there were always breaks, at least a week or two, sometimes a month, between the shutdown jobs. He has not considered work overseas or out of the country, admitting he has mostly looked for work within an "800 or so miles from home." Claimant could not testify whether the "hot sheets" contained jobs overseas or on the west coast, but assumed they do. (Tr. 45-47).

Claimant began working for Signal on May 15, 2004, as a rigger in its shipyard. He has worked at Signal regularly and continuously since the date he was hired. When the work got "slack," instead of laying people off, Signal began rotating work shifts, three days on and three days off. Claimant continues to work for Signal as of the date of formal hearing. He has been working 10 hours a day, seven days a week for $15.75 per hour. Claimant could not state when the job at Signal would end. He admitted he believes his work at Signal is "pretty much" within his restrictions. Claimant likes his work at Signal and it is his intention to stay there as long as it is available and as long as he can do the work. (Tr. 47-50).

Claimant admitted he rides horses as a hobby, uses a tractor, and mows his lawn using a riding mower. He used Ms. Howell's tractor to put out hay for his horses. Claimant's whole family helps care for the horses. Those are all the chores Claimant does around the house, his wife and sons do almost everything. (Tr. 51; EX-25, pp. 9-11).

On re-direct examination, Claimant reviewed EX-11, p. 19, a medical examination record, and admitted representing an ability to lift heavy weights up to 50 pounds, explaining he "didn't feel like [he] was employable" if he marked "no." Claimant also reviewed EX-27, p. 22 where he marked off that he did not have any medical restrictions or limitations, stating he lied because he wanted to work. (Tr. 52-53).

Claimant clarified he believed his job at Signal was temporary because he was told so by the rigging superintendent and the rig was to leave on August 18, 2004, after which he would be out of work. (Tr. 53).

Claimant stated he has never used the "hot sheets" to gain employment, but has heard about them through different people and actually looked at one brought to a job by a worker. Claimant's nephew usually advises Claimant of potential employment. (Tr. 53-54).

On re-cross examination, Claimant testified he was a "fair" rigger and most of his work as a boilermaker has been within his restrictions, since he mostly worked as a hold watcher and fire watcher. (Tr. 54-55).

Claimant stated he has not applied for permanent work because he does not know of anything available within a

reasonable distance from his home without having to relocate. He believed Ingalls was taking applications, but admitted he had not put in his application because when he was fired "they put on his application, 'no rehire,'[and does not know if] something like that will stick." (Tr. 55).

Claimant admitted being able to do all the work he has done regardless of the restrictions placed upon him on April 8, 1997 by Dr. Danielson. Claimant further admitted he has not experienced significant problems doing any of his recent employment. (Tr. 55).

Claimant worked for Ingalls prior to his 1997 injury. Although Claimant testified he was earning about $15.45 at Ingalls, payroll records reveal Claimant only earned $13.80 per hour in 1997. Claimant admitted he was mistaken. He earned up to $20 per hour on the shutdown jobs since his 1997 injury. Claimant explained that the shutdown jobs are only periodical work, therefore he earns more money. Claimant admitted he only worked 40-hour weeks when he worked for Ingalls rather than the 80-hour work weeks at the shutdown jobs. The year before the 1997 injury, Claimant did not work any overtime. (Tr. 55-58).

On further examination, Claimant explained the discrepancy in his earnings testimony, stating that after the second injury in 1997, Claimant continued to work on a modified job at Ingalls for a period of time, up until 1998, and during this period he received a wage increase. (Tr. 59). Claimant admitted he was not sure of the amount of the wage increase. He thought the wage increase was possibly $1.00 across the board hourly increase, plus $.35 each year for three years and then $.25 each year thereafter. (Tr. 59-60).

The Medical Evidence

According to Dr. Harry A. Danielson, a neurosurgeon, Claimant reached maximum medical improvement on April 8, 1997, and was released to his family physician for medical management. Dr. Danielson assigned Claimant a 14% anatomical impairment rating of his whole person due to anterior cervical discectomy with donor bone fusion at C5-6 and C6-7 performed on October 25, 1996. On April 8, 1997, Dr. Danielson placed Claimant on the following restrictions:

> No rapid head/neck movements, no working/stacking overhead, no prolonged extension of the neck and no prolonged ladder climbing. [Claimant] has a weight

> lifting limit of twenty or thirty pounds occasionally. He should change positions from sitting to standing to ambulating as his tolerance demands.
>
> [Claimant] is restricted from using any type of vibrating tools or doing any type of overhead working or pulling, such as burning lines.

(EX-2, p. 1).

Dr. John McCloskey, a neurosurgeon, reviewed Dr. Danielson's restrictions and determined on March 3, 1999 and April 23, 1999, sweeping was within Claimant's restrictions. Dr. Danielson confirmed Dr. McCloskey's conclusion on June 8, 1999, stating the "permanent restrictions assigned on April 8, 1997, do not preclude [Claimant] from sweeping." (EX-2, p. 2; EX-3, pp. 1-2).

Claimant underwent pre-employment physicals and drug screening at Fluor Daniels. His drug screen was negative. Claimant disclosed his March 1991 injury, but stated he had no permanent disability. The Fluor Daniels representative determined Claimant had "no visual hindrances." Claimant represented to Fluor Daniels that he had no physical impairments which would prevent him from working. Had Claimant advised Fluor Daniels of his prior injury, he would have been referred to a "physician for a proper evaluation." (EX-11, pp. 11, 13, 15, 17-19).

Claimant also underwent a pre-employment screening with Signal International. Claimant passed both his medical and drug screenings. He notified Signal of his August 1996 disc fusion operation, however, in contrast to his assigned restrictions, advised them that he is able to work "at heights up to 500 feet in the air . . . climbing ladders, scaffolds." (EX-27, pp. 13, 22).

The Vocational Evidence

Tommy Sanders was accepted as an expert in the field of vocational rehabilitation counseling. Mr. Sanders has been working on Claimant's case at the request of Ingalls Shipbuilding Incorporated ("Ingalls") since 1997. Mr. Sanders conducted several "hypothetical labor market surveys" at Employer's request. Mr. Sanders was retained by Ingalls again in 2004. Ingalls provided Mr. Sanders with copies of its records and his previous reports because his originals were

destroyed. Mr. Sanders also had an opportunity to meet with Claimant after reviewing the records provided to him by Ingalls. (CX-12, pp. 4-5; EX-24, pp. 1-14, 19).

Mr. Sanders met with Claimant on July 27, 2004, and believed Claimant to be cooperative in responding to questions posed during the interview. Claimant did not refuse to answer any of Mr. Sanders' questions. (CX-12, p. 5).

Mr. Sanders confirmed that as a result of Claimant's 1992 injury, Claimant was restricted to lifting no more than 20 to 30 pounds, must alternate between sitting, standing, and walking, no prolonged extension of the neck or ladder climbing, and no stacking or working overhead. With these restrictions, Mr. Sanders opined Claimant to be in a category of work consisting of "sedentary, light, and some levels of medium physical activity, but not a full range of medium." On September 22, 1998, Mr. Sanders opined "Claimant's restrictions remain consistent." (CX-12, p. 6; EX-24, p. 6).

Mr. Sanders now opines however, after discussing Claimant's post-trial work and efforts, that Claimant may perform light and medium work. Specifically, as to Claimant's work with Signal, as a hand rigger, Mr. Sanders opined Claimant is able to perform "light to medium work lifting up to approximately 35 to 40 pounds," which is within the normal type of work done by a hand rigger. (CX-12, pp. 6-7).

On July 15, 2004, Mr. Sanders reported the results of a preliminary labor market survey which included: (1) a maintenance mechanic position at Grand Casino in Biloxi, Mississippi which paid $10.60 per hour and was considered medium work with lifting occasionally up to about 50 pounds; (2) a lead shuttle bus driver at Grand Casino-Biloxi paying $8.00 an hour with lifting occasionally up to 50 pounds and frequently up to 25 pounds; (3) an optics polisher at PFG Precision Optics in Ocean Springs, Mississippi, which paid $8.00 per hour with lifting described as from five to 15 pounds; and (4) a meter reader for the City of Pascagoula, Mississippi, which paid $8.59 per hour with lifting occasionally up to 25 to 30 pounds and overhead lifting occasionally of two to 20 pounds. (EX-24, pp. 22-23).

Claimant advised Mr. Sanders of "sensations" in his arm during certain motions and that overhead work was causing him pain, otherwise he had minimal complaints. (CX-12, p. 7).

Mr. Sanders could not recall Claimant telling him whether he advised Signal of his restrictions or lack thereof. Mr. Sanders only recalled being advised that Claimant passed his pre-employment physicals. (CX-12, pp. 7-8).

Claimant reported that the pre-employment physicals were not very thorough, the doctor just asked him to pull his shirt up and right back down and several people were doing their examinations together. (CX-12, p. 8).

During their meeting, Mr. Sanders and Claimant reviewed Claimant's deposition and discussed his work history. Claimant worked as a plumber's helper part-time for his brother, bush-hogged for neighbors, and worked several shutdown jobs for B. E. & K. and Fluor Daniels. Claimant informed Mr. Sanders that he generally worked with a two man crew. Claimant's work as a bush-hogger was temporary since he only worked two or three times over a several month period. Claimant worked for Cronier Plumbing off and on for a period of two years. (CX-12, pp. 9-11; EX-24, pp. 21-23).

> Based on [Claimant] performing a number of shut down jobs in combination with him currently working for approximately two months from 32 to 70 hours weekly with minimum complaints, [Mr. Sanders was] of the opinion that these types of shut down jobs are suitable for [Claimant] as well as the jobs identified in my report of July 15, 2004. However, they exceed the limitations previously assigned by Dr. Danielson.

(EX-24, p. 25).

Mr. Sanders did not identify whether such jobs were available in the open job market as of August 4, 1992 or their pay rate at that time. Mr. Sanders testified he was "somewhat" familiar with the general job market in the geographical area of New Orleans to Mobile and Hattiesburg. Mr. Sanders could not state what was available in the area as far as shutdown work was concerned. (CX-12, p. 11).

Mr. Sanders admitted that due to the limitations assigned to Claimant, Claimant has lost some access to the general job market. (CX-12, p. 12).

Mr. Sanders described "vocational disability" as when a "percentile of the labor market that a person could do pre-injury as compared to post-injury, residual employability.

There's a percentage . . . it's loss of access to the labor market or a portion of the labor market." Based on the limitations assigned to Claimant, Mr. Sanders opined Claimant has a loss of access, but could not give an exact percentage. (CX-12, p. 12).

Mr. Sanders further opined, based on his interview with Claimant and the records provided, that Claimant is at a wage-earning capacity that was "probably" close to what he was making at Ingalls's shipyard. In fact, Mr. Sanders testified some of Claimant's jobs would probably pay more, however, such earnings are fairly consistent with his previous earnings. (CX-12, p. 13).

Mr. Sanders suggested a fair estimate of Claimant's current wage-earning capacity would be about $400 per week, possibly more. When asked to specify Claimant's current wage-earning capacity, Mr. Sanders advised he would use Claimant's current employment which pays him $15 per hour, even though it is only a temporary job. Mr. Sanders explained that Claimant works:

> a number of hours, 32 to 70 hours a week, albeit it's a temporary job, he's been on it two plus months . . . thinking of re-applying for full-time permanent employment . . . only sought shutdown type work . . . passed two physicals . . . hasn't been under doctor's care . . . since 1999 . . . not taking any prescribed medications.

(CX-12, pp. 13-15).

Mr. Sanders admitted he did not review the job descriptions for the work Claimant was performing at Signal International. He further admitted he did not know what physical abilities were actually required of Claimant. Mr. Sanders was not familiar with the job description of a hand rigger at Ingalls. In addition, Mr. Sanders has not made a determination of what Claimant actually earned on an annual basis since the original hearing. Mr. Sanders did not know if Ingalls offered Claimant work since then. Finally, Mr. Sanders agreed there has been a loss of access to the job market to Claimant as a result of the permanent restrictions connected to his accident of August 4, 1992. (CX-12, pp. 15-16).

On cross-examination, Mr. Sanders acknowledged, after reviewing Claimant's sworn testimony, that he believed Claimant's testimony to be very truthful. Claimant related all

the work he has done since the original Decision and Order entered in this case. Claimant further related he has not had any significant problems doing any of the jobs he has since performed. (CX-12, p. 16).

Since Claimant has not had problems doing shutdown work, Mr. Sanders opined these jobs were suitable for Claimant. Mr. Sanders based his opinion on the following: the restrictions which were assigned in April 1997; Claimant passed recent physicals which showed him suitable for the shutdown jobs; he has not sought medical care; he has not had any new injuries; and he has worked up to 70 hours per week without any significant problems. Mr. Sanders testified Claimant does not have any limitations on the number of weeks he can work with a certain employer and opined Claimant could work 70 hours per week on a permanent basis. Mr. Sanders further opined even if the work Claimant was doing was temporary, there was no reason Claimant could not do a similar job elsewhere once he left his current job with Signal. Mr. Sanders testified, in fact, all shutdown work is temporary and a lot of people, including union members, work shutdown jobs for a living, going from shutdown to shutdown. (CX-12, pp. 17-20).

Based on the vocational and medical evidence and his discussions with Claimant, Mr. Sanders believed Claimant could work full-time shutdown work. Moreover, Claimant could possibly return to his old job at Ingalls, but he has not asked for a job and has just been thinking of reapplying. (CX-12, p. 20).

At the initial hearing, Mr. Sanders determined Claimant could perform unskilled to semi-skilled work of a sedentary, light, and some level of medium work. However, Mr. Sanders noted Claimant is now performing more skilled work of a medium level. Mr. Sanders admitted the jobs he identified in previous surveys were mostly for entry level unskilled light jobs. (CX-12, pp. 20-22).

Based on Claimant's recent job history and his statements that he felt capable of performing the work, Mr. Sanders opined, based on probability that Claimant has "sustained an economic change of condition such that now he can perform medium work of a skilled nature." Specifically, Claimant can perform semi-skilled to skilled versus primarily unskilled work as before. (CX-12, pp. 21, 23).

Claimant has been earning $15 to $20 per hour, including a great deal of overtime. Mr. Sanders also opined the types of

jobs Claimant has been performing would have paid a similar wage in 1997. Mr. Sanders testified Claimant's current earnings are representative of his current wage-earning capacity. (CX-12, pp. 21-23).

Mr. Sanders could not determine whether Claimant seemed interested in returning to full-time employment or preferred doing shutdown work. Mr. Sanders believed Claimant could do any of his previous jobs and was not limited by his physical condition. It is customary when hand rigging to be working in a two-man team and Claimant was not getting favored when he was provided with a helper. (CX-12, pp. 22, 24).

Mr. Sanders admitted that Judge Kerr originally determined Claimant had a loss of wage-earning capacity based on the jobs Mr. Sanders found, however, further explained that Judge Kerr's opinion was five years old and Claimant no longer has a wage loss. (CX-12, p. 25).

On redirect-examination, Mr. Sanders testified the shutdown jobs were performed throughout the southeast, including South Carolina, Arkansas, Louisiana, Georgia, Tennessee, and Mississippi. Claimant was not a shipfitter at any of these shutdown jobs. Claimant has not done any work as a shipfitter since the original hearing of this case. Mr. Sanders provided the current hourly rate at Ingalls for a shipfitter or hand rigger is $17 plus. (CX-12, p. 26).

The Contentions of the Parties

Employer contends Claimant began obtaining employment in May 2000. Employer admits none of Claimant's initial jobs caused any significant increase in his wage-earning capacity. However, Employer contends there has been a change of condition since October 1, 2001, when Claimant began performing shutdown jobs, averaging $700 per week. Employer argues Claimant had a significant change in his physical and economic conditions which shows he no longer has a loss of wage-earning capacity and supports a modification of Judge Kerr's previous Decision and Order.

Employer further argues Claimant has not had any significant problems since he has not seen a doctor in seven years, has not sought any further medical treatment, has not had any new injuries, has increased his wage-earning capacity, and, has passed pre-employment physical examinations to obtain shutdown jobs. In fact, Employer contends the restrictions

originally assigned to Claimant are over seven years old and are no longer relevant since Claimant admits he is able to perform shutdown work without any significant pain. Employer further contends Claimant's work capability has increased, from unskilled to semi-skilled work of a sedentary capacity, to a semi-skilled to skilled work of a medium capacity.

Claimant, on the other hand, contends he has a permanent impairment with permanent restrictions, which have never been changed, and there has been no change in circumstances regarding his wage-earning capacity. Claimant argues that the work he has performed since the July 28, 1999 hearing, was either within his restrictions, or, in order to earn higher money, he misrepresented his restrictions to his various employers. Claimant further contends he has not sustained regular, routine and consistent employment, but only periodic temporary types of work.

Claimant also contends that the vocational expert could not confirm whether Claimant's shutdown work was available at the time of injury or what such jobs paid. Claimant argues that a determination of the amount of pay available for shutdown work was necessary to fairly adjust his wage-earning capacity in order to compare what the job would have paid at the time of injury as opposed to what it currently pays. Claimant contends the vocational expert testified that a fair earning capacity would be $400 but could not testify with certainty that Claimant's current earning capacity exceeded $400. Therefore, Claimant contends there has been no change in Claimant's physical or economic condition which would justify termination of benefits.

Alternatively, Claimant requests, if it is determined that he has an increased wage-earning capacity above his pre-injury wage earning capacity, the undersigned should find Claimant is nonetheless entitled to a **de minimis** award because he has significantly restricted access to the job market due to his impairment and restrictions and the alternative employment of shutdown jobs is temporary in nature.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves

factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Section 22 Modification

Section 22 of the Act provides the only means for changing otherwise final decisions on a claim; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995). The rationale for allowing modification of a previous compensation judgment is to render justice under the Act. The party requesting modification has the burden of proof to show a mistake of fact or a change in condition. See Vasquez v. Continental Maritime of San Franscisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984).

An initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or a change in circumstances or conditions. Duran v. Interport Maintenance Corp., 27 BRBS 8 (1993); Jensen v. Weeks Marine Inc., 34 BRBS 147 (2000). This does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted considering all of the relevant evidence of record in

order to discern whether there was, in fact, a mistake of fact or a change in physical or economic condition. Jensen, 34 BRBS at 149.

It is well-established that Congress intended Section 22 modification to displace traditional notions of **res judicata**, and to allow the fact-finder to consider any mistaken determination of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflections upon evidence initially submitted." O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 92 S.Ct. 405 (1971), reh'g denied, 404 U.S. 1053 (1972). The administrative law judge, as trier of fact, has broad discretion to modify a compensation order. Id. However, Section 22 modification is not intended as a basis for re-trying or litigating issues that could have been raised in the initial proceeding or for correcting litigation strategies, tactics, or errors or misjudgment of counsel. General Dynamics Corp. v. Director, OWCP [Woodberry], 673 F.2d 23, 14 BRBS 636 (CRT)(1st Cir. 1982); McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (CRT)(D.C. Cir 1976); Delay v. Jones Washington Stevedoring Co., 31 BRBS 197, 204 (1998).

When an employer seeks modification, the employer has the burden of establishing a change in condition justifying modification. Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, 139, 117 S.Ct. 1953 (1997). The employer satisfies this burden by showing, that as a result in change of capacity, claimant's wages have "risen to a level at or above his pre-injury earnings." Id. Once the employer makes this showing, the burden then shifts back to the claimant to show the likelihood of a future decline in capacity is sufficient for an award of **de minimis** compensation. Id.

1. Change in economic condition

Modification based upon a change in conditions or circumstances has been interpreted broadly. Rambo I, 515 U.S. at 296. A change in claimant's earning capacity qualifies as a change in condition under the Act. Id. Once a moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. Rambo I, 515 U.S. at 296; Vasquez, 23 BRBS at 431; Delay, 31 BRBS at 197.

A change in claimant's actual wages becomes controlling when the actual wages "fairly and reasonably represents . . . wage-earning capacity." Rambo I, 515 U.S. at 235. A disability

award may be modified under Section 22 when there is a change in claimant's wage-earning capacity, even without any change in his physical condition. Id. The Act does not necessarily authorize compensation for a claimant's physical injury, but for the economic harm to the injured worker from decreased ability to earn wages. Rambo II, 521 U.S. at 126. The Act defines "disability" as "incapacity because of injury to earn the wages which employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2004). In other words, a claimant's disability is a measure of earning capacity lost as a result of a work-related injury. Rambo II, 521 U.S. at 128.

However, just because there is a fluctuation in a claimant's actual wages does not mean there is an automatic right to modification. Only "shifts reflecting a change in the worker's underlying capacity, such as a change in physical condition, skill level, or the availability of suitable jobs" reflect actual changes in economic condition. Id. at 131.

In the instant case, Employer sought Section 22 modification. Employer, therefore, has the burden of establishing that there has been a change in physical or economic conditions.

Claimant originally suffered a loss in wage-earning capacity as of April 15, 1998, as determined by Judge James Kerr on October 6, 1999, and affirmed by the Benefits Review Board on December 13, 2000. (EX-4; EX-5; EX-6). The issue however, is whether Claimant continues to have a loss in wage-earning capacity since he began working shutdown jobs on October 1, 2001.

Claimant contends all work done on shutdown jobs was only temporary in nature and should not be used in determining an increase in his wage-earning capacity. However, since 2001, Claimant has admittedly worked on over 15 of these temporary shutdown jobs, lasting anywhere from a few weeks up to five months. In addition, both Claimant and Mr. Sanders acknowledged that many people earn their living doing shutdown jobs regularly – moving from one shutdown job to another.

Currently, Claimant works as a rigger for Signal. He testified this job was temporary in nature and would be ending soon. I note however, Claimant testified he did not have any trouble getting hired at Signal even after he advised them about his neck injury and surgery. Actually, the normal routine of

Signal, B. E. & K., and Fluor Daniels requires that helpers be provided to riggers or boilermakers. (Tr. 37-38).

Prior to his original injury Claimant earned on average $13.80 - $15.45 per hour. Judge Kerr determined due to the nature of Claimant's injury, Claimant had an average weekly wage of $520.65 and because Claimant was only permanently partially disabled, Claimant's weekly compensation benefits would amount to $206.31. Since 2001, Claimant has been working on average 40-60 hours per week, for seven days a week. At some points, Claimant has been earning up to $2,000 per week. This is well above Claimant's average weekly wage. Prior to his initial injury, Claimant only worked for Ingalls on average 40 hours per week. (Tr. 40, 55-57).

Claimant knows he can find shutdown work all year round by utilizing "hot sheets," which lists various openings for shutdown work all around the country. He testified a person can buy hot sheets in convenience stores, even though he has never done so personally. I find that even though the shutdown work is temporary, the availability of higher wages and overtime places Claimant at a higher wage-earning capacity than prior to his 1997 work injury. (Tr. 34-36).

Although, Claimant believes he was only hired because he did not disclose his medical restrictions, Claimant advised Signal of his neck injury and surgery. He further admitted he has not searched for or applied for permanent work because he does not know what is available in his geographical area, despite notification by Mr. Sanders of available work within the medical restrictions assigned by Dr. Danielson. Claimant admitted he believed Ingalls was taking applications, but he has not reapplied because when he left he believes his file was marked "no rehire." (Tr. 55).

When working shutdown jobs, Claimant does not usually have to lift more than 40 pounds as a rigger and when he does, he usually has a helper assist him. In contrast, Claimant's work at Ingalls, prior to his injury, required him to frequently lift more than 40 pounds. Although Claimant was placed on a restriction of lifting no more than 20-30 pounds frequently, Claimant admitted he has on occasion lifted more without any problems or complaints. (Tr. 29; EX-25, p. 15).

Despite working 12-hour days, Claimant has not sought any medical treatment for his permanent neck injury since 1999. Regardless of the restrictions Dr. Danielson placed upon

Claimant in 1997, Claimant admitted he is capable of doing all the work he has been doing. Moreover, Claimant testified he has not had any significant problems doing any of his recent employment. In fact, Claimant believes he gave a "good day's work for a good day's pay." (Tr. 41, 43, 55).

Employer is not seeking modification under Section 22 of the Act based on a mistake of fact. Rather, Employer maintains Claimant's wage-earning capacity improved since the 1999 Decision and Order, justifying modification. The work history beginning in 2001 demonstrates a change in circumstances subsequent to the Benefits Review Board's affirmation of the 1999 Decision and Order.

Moreover, the facts now presented suggest a change in economic condition has occurred, namely Claimant has been working anywhere from 32 up to 84 hours per week within his residual restrictions and has been earning on average $15-20 per hour.

Since Judge Kerr's 1999 decision, Claimant has had several jobs which I find to be irrelevant to my decision in this case. His work for Cronier Plumbing, Autry Greer & Sons, Jackson School District and Ms. Howell, do not constitute suitable alternative employment justifying a finding of a change in condition or circumstances. However, in October 2001, Claimant began working as a boilermaker on various shutdown jobs. These jobs, although temporary in nature, pay more than Claimant's prior work and tend to be within his medical restrictions assigned by Dr. Danielson. On occasion, Claimant is asked to lift more than 40 pounds; however, Claimant admits he always has helpers assisting him.

Mr. Sanders affirmed that due to the limitations assigned to Claimant, Claimant has lost some access to the general job market, but could not assign an exact percentage of loss. (CX-12, p. 12). Mr. Sanders admitted that although some of Claimant's work would probably pay more than his previous jobs, Claimant's pay has been fairly consistent with his previous earnings. (CX-12, p. 13). Mr. Sanders gave a fair estimate of Claimant's current wage-earning capacity as "about $400 per week, possibly more," but admitted he has not made a determination of what Claimant actually earned on an annual basis since 2001. (CX-12, p. 13). Claimant has continued to receive permanent partial disability compensation benefits during the entire period at a weekly compensation rate of $206.31 since Judge Kerr's Decision and Order.

In spite of Mr. Sanders's failure to determine Claimant's weekly wage earnings since 2001, the evidence has shown Claimant has consistently earned higher wages than he earned prior to his injuries. Although Claimant testified shutdown work is only available during the "cooler" months, Claimant admitted he has not looked for work outside the Louisiana-Mississippi area or in the "hot sheets." (Tr. 42-44).

Thus, I find Employer has demonstrated Claimant has had a change of economic condition. Therefore, a determination of whether Claimant is likely to suffer a future decline is necessary in determining whether a **de minimis** award should be granted.

2. Likelihood of future decline justifying de minimis award

The potential effects a disability will have in the future must be given its "due regard" as one of the factors or circumstances which will cause a claimant to have future loss in wage earning capacity. Rambo II, 521 U.S. at 130. There must be a "cognizable category of disability that is potentially substantial, but presently nominal in character." Id. at 131-132. Nominal compensation is justified when "a future conjunction of injury, training, and employment opportunity should later depress the worker's ability to earn wages below the pre-injury level, turning the potential disability into an actual one." Id. at 135; see also 33 U.S.C. § 908(h) (2004). Therefore, a worker is entitled to a **de minimis** award when his work injury may not presently diminish his wage-earning capacity, "but there is a **significant potential** that the injury will cause diminished capacity under future conditions." Rambo II, 521 U.S. at 138; Gilliam v. Newport News Shipbuilding and Dry Dock Co., 35 BRBS 69, 71 (2001).

Nominal or **de minimis** awards are benefits which a claimant may be entitled to, if he has no current loss of wage-earning capacity as a result of his injury, but has established a significant possibility that the injury will cause future economic harm. Jones v. Newport News Shipbuilding and Dry Dock Co., 36 BRBS 105 (2002); Rambo II, 521 U.S. at 138. A nominal award is available to preserve the right of a claimant when there "is a significant possibility that the worker's wage-earning capacity will fall below the level of his pre-injury wages sometime in the future." Rambo II, 521 U.S. at 123, 137. "Claimant bears the burden of proving by a preponderance of the evidence that 'the odds are significant that his wage-earning

capacity will fall below his pre-injury wages at some point in the future." Jones, 36 BRBS at 106, citing Rambo II, 521 U.S. at 139.

Both 33 U.S.C. §§ 908(h) and 922 require a "forward looking perspective" in considering whether a claimant has suffered a decline in wage-earning capacity. Hole v. Miami Shipyards Corp., 640 F.2d 769, 772 (5th Cir. 1981). The court reasoned that requiring a forward looking perspective was "far less arbitrary than picking a disability figure out of thin air." Id. at 773.

Dr. Danielson opined Claimant reached maximum medical improvement on February 6, 1998 and reiterated his April 8, 1997 restrictions on Claimant. (EX-2, p. 1). Claimant was given an impairment rating of 14% to the body as a whole due to anterior cervical discectomy with donor bone fusion at C5-6 and C6-7.

Claimant has typically been working within these restrictions when doing shutdown work. Claimant testified he has mostly been doing "hole watch" or "fire watch" and very rarely has to lift more than 40 pounds. Claimant even admitted, when he does have to lift more than 40 pounds, he has a helper.

Claimant has been working 32 to 84 hours per week since October 2001. Although the nature of his work is temporary, Claimant admits he has been working shutdown to shutdown with one week to a few months breaks in between the jobs. When applying for shutdown jobs, Claimant testified he has not disclosed his prior injuries or medical restrictions to potential employers because he believed such a disclosure would make him "[un]employable." (Tr. 37-38, 45-46).

Prior to beginning these shutdown jobs, Claimant underwent pre-employment physicals. Claimant testified, since October 2001, he has undergone about nine pre-employment physicals through B. E. & K. and about six through Fluor Daniels. Claimant admits he passed all pre-employment physicals. (Tr. 24). During these physicals, Claimant's blood pressure was checked, he was asked to do several motions, such as twisting and sitting, and a nurse or doctor checked Claimant's reflexes. (Tr. 25). Claimant testified the doctor did not examine his neck or check the rotation of his head. (Tr. 25).

Claimant has not sustained any new injuries since beginning work on these shutdown jobs. (Tr. 40). In addition, Claimant did not complain of any significant problems performing the

work. (Tr. 40). Claimant did admit, despite working 12-hour days, he has not sought medical attention since 1999.

Considering the nature of the shutdown work and Claimant's ability to work 80-hour weeks without complaint, it does not appear that there is a **significant potential** that his work injury will cause diminished capacity under future conditions. Claimant has worked for the last three years doing shutdown work and has not sought medical treatment, taken prescribed medication or even complained of pain. His treating and consulting physicians have not opined that there is likelihood of a **significant potential of future decline** in Claimant's work capacity.

Claimant began obtaining employment in May 2000. Although, none of Claimant's initial jobs caused any significant increase in his wage-earning capacity, I find since October 1, 2001, Claimant has been performing shutdown jobs, averaging weekly more than he earned pre-injury. There has been a significant change in Claimant's economic conditions which shows he no longer has a loss of wage-earning capacity.

Similar to the claimant in Gilliam, Claimant has not provided one medical record which would show a **significant possibility** of future harm justifying a **de minimis** award. 35 BRBS 69. Although Claimant has been assigned a 14% whole body impairment, he has worked for the past 3 years without complaint. He has not testified to any significant problems and has not seen a doctor in seven years, has not sought any further medical treatment, has not had any new injuries, has increased his wage-earning capacity, and has passed pre-employment physical examinations to obtain shutdown jobs. In fact, the restrictions originally assigned to Claimant are over seven years old and are no longer relevant since Claimant admits he is able to perform shutdown work without any significant pain. In addition, according to Mr. Sanders, Claimant's work capabilities have increased, from unskilled to semi-skilled work of a sedentary capacity, to a semi-skilled to skilled work of a medium capacity.

Although Claimant contends the shutdown work was either within his restrictions or he misrepresented his restrictions, Claimant has performed this work without any complaints or new injuries for three years. The fact that these shutdown jobs are temporary in nature makes little difference since Claimant and Mr. Sanders acknowledge it is typical for someone to work shutdown job to shutdown job. Claimant's failure to sustain

regular, routine and consistent employment is not due to his injury and restrictions, but is due to his failure to even attempt to look for permanent work.

Although Claimant is correct that Mr. Sanders did not confirm whether Claimant's shutdown work was available at the time of injury or what such jobs then paid, Claimant's continued shutdown work history is sufficient for the undersigned to determine Claimant has available suitable alternative employment, and as such, a change in his economic condition has occurred.

Since Claimant has not sought medical treatment since 1999 outside of his pre-employment physicals, the undersigned is unable to determine whether Claimant is likely to suffer a future decline in wage-earning capacity or whether there is a **significant potential** that his injury will cause a future diminished capacity. Admittedly, Claimant has had restricted access to the job market, but even with this restricted access, Claimant has been able to achieve a significantly greater wage-earning capacity than he earned pre-injury with Ingalls.

My review of the evidence leads me to conclude that Claimant, through his own honest and hard-working efforts, is no longer experiencing a loss in wage-earning capacity. As such, discontinuation of his disability benefits is justified. I do not rely solely upon the uncontroverted evidence that Claimant is earning more doing shutdown work than in his old job, but have considered all factors which may affect his future-earning capacity, including Claimant's age, education, medical disability, skills, training, and vocational expert testimony.

Accordingly, I find and conclude that the record is devoid of any medical evidence that Claimant may experience a **significant potential** of diminished capacity warranting a finding that a **de minimis** award is appropriate. Modification is justified since Claimant has had a change in economic condition, since October 1, 2001, which increased his current wage-earning capacity above his pre-injury wage-earning capacity and there is no **significant potential** of future decline.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein because Claimant failed to successfully prosecute/defend the issues for resolution.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer's request for modification under Section 22 is **GRANTED**.

2. Employer has established that Claimant achieved an increased wage-earning capacity, no longer suffers an economic loss and is no longer entitled to disability compensation benefits effective October 1, 2001.

3. Claimant has not established the likelihood of a significant potential for future decline in capacity sufficient to warrant an award of **de minimis** compensation.

ORDERED this 30th day of November, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge